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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 865

A QUANTITY OF COPIES OF BOOKS, FRANCIS G. VATER AND JOE RECTOR, JR., Co-Partners, d/b/a RECTOR'S BOOK STORE, WICHITA, KANSAS,
Petitioners,

vs.

STATE OF KANSAS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

The opinion of the Supreme Court of Kansas, holding the paperback booklets here involved to be obscene, and reversing the trial court, is reported at 197 Kan. 306, 416 P.2d 703, and appears in the record beginning at page 43. The trial court's opinion is unreported, but appears in the record beginning at page 29

JURISDICTION

The petitioners seek to have this Court accept jurisdiction under 28 U.S.C., Section 1257(3).

QUESTIONS PRESENTED

1. Are these paperback booklets obscene and therefore not protected by the First and Fourteenth Amendments?

2. Should an appellate court in an obscenity case review the questioned material and determine independently whether or not it is constitutionally protected?

3. May a state, in a civil case, provide for seizure of material found to be obscene after an adversary proceeding, without providing a jury trial of right?

4. Does K.S.A. 21-1102, as construed by the Kansas Supreme Court, contain a definition of obscenity which is consistent with the First and Fourteenth Amendments?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the Constitution of the United States, and Kansas Statutes Annotated 21-1102, 21-1102(a) and 21-1102(c) are all set out in Appendix C of the Petition for Certiorari.

STATEMENT OF FACTS

On July 24, 1964, the Attorney General of Kansas filed wih the District Court of Sedgwick County, Kansas, an information alleging that copies of 11 paperback booklets were being kept for sale at Rector's Book Store in Wichita, Kansas, and that they were obscene and thus in violation of K.S.A. 21-1102. The information requested an order to the owners to show cause why a warrant for seizure of these booklets should not issue. A copy of each booklet was filed with the information. (R. 3-4). Sum-

maries of these booklets are printed in an appendix to this brief.

An order to show cause was issued the same day by Judge Howard C. Kline, setting a hearing for July 31, 1964. The order recited that the judge had fully read three of the booklets and had examined the eight others, and that there was reason to believe they were obscene. (R. 4).

On July 31, 1964, the owners of Rector's Book Store, Francis G. Vater and Joe Rector, Jr., petitioners herein, appeared by counsel and moved (1) to quash the information and to dismiss the proceedings, (2) for jury trial, and (3) for a continuance of the hearing on the merits. The court overruled the first two motions, but granted a continuance to September 22, 1964. (R. 5-8).

Thereafter the owners moved that Judge Kline disqualify himself, on the ground that he had prejudged the case by reading the booklets and determining that they were obscene. On August 20, 1964, Judge Kline granted this motion, ordered the case transferred to another division, and vacated the order setting the hearing for September 22. (R. 8-9).

The case was reassigned to Judge E. E. Sattgast, and on September 18, 1964, motions to quash and dismiss and for jury trial, identical to those previously made, were overruled by him. (R. 9-10).

After a pre-trial conference, a pre-trial order was entered, in which the parties stipulated that copies of the 11 booklets were purchased by agents of the Attorney General in July, 1964, that the owners had not read these titles, and that they do not as a matter of course read the wide variety of printed material sold by them. (R. 10-11).

When the case was heard on December 10, 1964, the State introduced copies of the 11 titles (plaintiff's exhibits A through K) and rested. The defense then moved to dismiss on the ground that the State had not introduced evidence of community standards and hence had failed to sustain its burden of proof. The court took this motion under advisement. (R. 17-23). The defense introduced copies of nine books by well-known authors (defendants' exhibits 1, 2, and 4 through 10), as well as the testimony of Robert B. Cutler, Associate Professor of English at Wichita State University, to show that the community standards were not transgressed by the 11 booklets named in the information. (R. 14-27).

Upon the death of Judge Stattgast before he had rendered a decision, the case was reassigned to Judge Tom Raum. It was stipulated by the parties that the case could be decided by him on the record already made. (R. 28-29).

On July 9, 1965, Judge Raum filed his memorandum opinion, finding that the books named in the information were not obscene and refusing to issue a search warrant. (R. 29-36). The State appealed to the Supreme Court of Kansas from this finding, and the defense cross-appealed from the earlier orders denying its motion to quash and dismiss and for jury trial. (R. 37-38).

The Supreme Court found the booklets to be obscene and reversed the trial court on this point, while affirming the order refusing to quash and dismiss and the order denying jury trial. (R. 43-65). Rehearing was denied. (R. 83). The mandate of the Kansas Supreme Court has been stayed pending disposition of the petition for writ of certiorari.

ARGUMENT

I.

These Booklets Are Obscene, and Are So Characterized by Their Packaging.

These booklets meet every test for obscenity announced by this Court. When their contents and packaging are considered together, it is apparent that they are designed and sold solely as part of the "sordid business of pandering."

What we have here is not literature or speech, but a business. In times past this industry has operated largely in a surreptitious manner. Today, however, as evidenced by the booklets in this case, it has begun to come out of the back alleys and onto the legitimate newsstands. In an effort to avoid the legal prohibitions against their ancient product, the purveyors have packaged it as a paperback book. They have omitted some of the four-letter words, and they have inserted a semblance of a plot. However, all the usual attributes of surreptitious obscenity are retained; and the publisher's sole purpose is to exploit an interest in titillation by pornography.

This Court held last term in *Ginzburg* v. *United States*, 383 U.S. 463 (1966), that: "Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity." Here the seller's characterization of his product is boldly advertised on the covers and flyleaves of these booklets. Each cover pictures a scantily-clad woman in an obviously provocative pose. Each title carries definite sexual implications. At the top of each cover

there appears some titillating line, such as "Passion drove him on a lust hunt to vengeance!". The back cover features a short advertisement of the prurient contents; so does the front flyleaf. Even the brand names printed on the fronts have been chosen with titillation in mind (e.g., Idle Hour, Sundown, Ember). The "leer of the sensualist" permeates this advertising just as surely as it did in the *Ginzburg* case. Since it follows these booklets wherever they are sold, it should be decisive in determining the question of their obscenity. *Books, Inc.* v. *United States*, 358 F.2d 935 (1st Cir. 1966), *petition for cert. filed*, 35 U.S.L. Week 3075 (U.S. July 8, 1966) (No. 323).

Nor do the contents of these booklets fail to live up to their advertising. The prurient appeal of their dominant theme will hardly disappoint the buyer whose interest in titillation has been aroused by their covers. All of them are divorced from reality and their main function is to nourish erotic fantasies in the reader's mind. They are marked by a daydream quality, which two leading scholars have said is a chief characteristic of obscenity. Lockhart and McClure, *Obscenity Censorship*, 7 Utah L. Rev. 289 (1961). The erotic scenes required for these fantasies recur regularly throughout the book, without distracting character development or philosophical discussion. This, too, is a major characteristic of obscenity. Kronhausen and Kronhausen, *Pornography and the Law*, p. 178 (Ballantine, 1959). As may be seen from summaries contained in the appendix to this brief, the booklets in this case possess most of the other attributes of obscene literature noted by the Kronhausens in their book (pp. 195-244):

(1) The women are as anxious to be seduced as the men are to seduce them.

(2) The females are generally of the nymphomaniac type. They are almost invariably beautiful of face and possess overdeveloped figures. They have no concern whatsoever about pregnancy. There is no trace of modesty or remorse, or fear of venereal disease, and love is almost never mentioned.

(3) Defloration is coupled with rape and sadism. The female is generally desirous of the act and obtains exotic enjoyment despite the pain. There is seldom any hostility on the part of the female who has been raped.

(4) The males are generally supersexed.

(5) Lesbianism is common, since it is assumed to have an erotic effect on the predominantly male audience.

(6) Violence and flagellation are common, almost invariably perpetrated on the females.

(7) Sexual orgies involving several persons of both sexes are common.

(8) Cunnilingus and fellatio occur, as does sodomy per anus. Incest is also present.

This erotic material has been hung on an extremely rudimentary plot; and the whole has been mass-produced by an industry based on the "commercial exploitation of the morbid and shameful craving" for such materials. *Roth* v. *United States*, 354 U.S. 476, 496 (1957) (concurring opinion of Warren, C.J.).

These booklets bear a striking resemblance to the paperback books found to be obscene in *Mishkin* v. *New York*, 383 U.S. 502 (1966). Like those in *Mishkin*, these booklets have a standardized format and a repetitive quality to their sequences. The prices printed on the covers

are exorbitant. They are cheaply prepared and in massive numbers, as may be seen from the long lists of similar books which they contain. The character of their material is transparent. They depict sexual deviations, such as sadism, masochism, fetishism and homosexuality. Many of the covers show women being abused. In sum, it is apparent that Mishkin was in the same business as the publishers of the booklets now before the Court.

Although this Court's discussion in *Mishkin* of the nature of the material is devoted primarily to the prurient-appeal question, it seems implicit in the decision that such paperback pornography also satisfies the requirements outlined in *Memoirs of a Woman of Pleasure* v. *Attorney General*, 383 U.S. 413 (1966) (opinion of Brennan, J.), i.e., that obscene material be patently offensive to contemporary community standards and that it be utterly without redeeming social value. The booklets here involved clearly satisfy both these tests.

Patent offensiveness, it has been said, is that characteristic of indecency which is the basis of society's objection to obscene material. *State* v. *Hudson County News Co.*, 41 N.J. 247, 196 A.2d 225 (1963). Certainly the descriptions in these booklets of group orgies, cunnilingus, fellatio, sodomy, sadism, masochism and rape are patently offensive to contemporary standards of decency. Their offensiveness is reinforced by the prominent display given these descriptions on the covers and flyleaves. *Cf. Ginzburg* v. *United States.*

Nor is there any redeeming social value to be found in these paperback booklets. They are devoted exclusively to sexual fantasy, sadism and perversion. As the court below noted, "None of these books makes any effort at characterization or insight into human nature, no attempt

is made to portray reality, no ideas are presented, no story is told, nothing is said to advance human knowledge or understanding in science, literature or art". The best that petitioner's own expert witness could muster with regard to their social value was that they may be read easily by persons of limited and unsophisticated background who have an interest in erotic experience. (R. 34-35). But this is merely to say that their prurient appeal is designed for persons of limited education. It does not establish that they have social importance. Furthermore, "evidence that the book was commercially exploited for the sake of prurient appeal, to the exclusion of all other values, might justify the conclusion that the book was utterly without redeeming social importance". *Memoirs of a Woman of Pleasure* v. *Attorney General* (Separate opinion of Brennan, J.). The packaging of these booklets demonstrates overwhelmingly that they are merely pawns in the commercial exploitation of a prurient interest in sex. As such, they have no importance whatsoever to society.

II.

This Court and the Court Below Are Entitled to Determine for Themselves Whether These Booklets Are Obscene.

Petitioners suggest that because the record contains so-called "expert" testimony that these booklets are not obscene, and because the state trial court agreed with this testimony, this Court and the Supreme Court of Kansas have no choice but to find them obscene also.

However, their suggestion completely disregards the well-established principle that in obscenity cases this Court and other appellate courts must review the questioned material and independently determine whether or not it is obscene. This Court recently reaffirmed the principle in *Ginzburg* v. *United States*, 383 U.S. 463 (1966). The

Court's opinion states that, "In the cases in which this Court has decided obscenity questions since *Roth*, it has regarded the materials as sufficient in themselves for the determination of the question." This practice is required because the question of obscenity is a federal constitutional question; and as such it must ultimately be decided by the Court on appeal. The reasoning and authorities supporting this view are thoroughly reviewed in *Jacobellis* v. *Ohio*, 378 U.S. 184 (1964) (opinion of Brennan, J.). Decisions of lower federal and state courts are overwhelmingly in accord. See the cases collected in Annot., 5 A.L.R. 3rd 1158, 1191 (1966).

The court below followed this view, stating: "Constitutional judgments are for ultimate decision of this Court; here the entire record will be reviewed independently as to constitutional protection to be afforded the questioned material. We have no problem of weighing conflicting evidence upon disputed questions of fact" (R. 54). That court, following what it took to be its constitutional duty, examined the eleven paperback booklets here involved, as well as the comparison evidence and "expert" testimony of petitioners, and concluded that they are obscene and hence not protected. In this it was correct

The appellate courts cannot be bound, as petitioners wish, by the opinion of Professor Cutler that the paperbacks here in question are not constitutionally obscene. That question is a judicial one, and its resolution may not be delegated to a critic and teacher of literature, as petitioners demand. This Court and the Supreme Court of Kansas are entitled to disagree with Professor Cutler's opinions, if an examination of the booklets themselves shows them to be obscene.

These booklets are the best evidence of their own character. They are "sufficient in themselves for the determination of the question" of their obscenity. *Ginzburg* v. *United States, supra.* For this reason, evidence extrinsic to the challenged materials, such as that introduced in this case, although it may assist in determining their obscenity, cannot bind a reviewing court on the ultimate constitutional question. For the same reason it is absurd to suggest, as petitioners do in their brief, that the charge of obscenity made here is totally devoid of evidentiary support in the record. *Cf. Thompson* v. *Louisville,* 362 U.S. 199 (1960).

Recognizing that this Court does exercise its indedependent constitutional judgment in obscenity cases, petitioners suggest that the State Supreme Court had no right to make such a determination here because the trial court's ruling was in their favor. (Petition, pp. 35-37). Although petitioners are afforded full appellate review of a decision against them, they argue that the State should not have this opportunity. Such a notion in a civil case smacks of one-sided justice. The State should have the same right to appellate review in its Supreme Court as the petitioners have. Their suggestion would not only be unfair to the public, but it would prevent uniform application of state obscenity statutes and federal constitutional principles within the state. Furthermore, the scope of review to be exercised by state appellate courts in obscenity cases should be left to those courts. Certainly no federal right of these petitioners was abridged by the Kansas Supreme Court's independent determination of their claim that these booklets are constitutionally protected.

III.

No Jury Trial Was Required on the Question of Community Standards.

Petitioners' argument that they have a right to jury trial in this civil proceeding is based on the erroneous premise that only a jury is competent to decide the extent of community toleration. If judges could not constitutionally decide this question as well as juries, then appellate judges would be incapable of exercising the independent constitutional judgment necessary for a review of the question of obscenity. *Cf. Jacobellis* v. *Ohio*, 378 U.S. 184 (1964) (Opinion of Brennan, J.). As a constitutional question, community toleration must ultimately be decided by the court on appeal. This being true, it simply cannot be said that judges are incompetent to determine the extent of that toleration. Presumably this Court makes such a determination in reviewing material claimed to be obscene. See, e.g., *Mishkin* v. *New York*, 383 U.S. 502 (1966); *Times Film Corp.* v. *Chicago*, 355 U.S. 35 (1957); *Mounce* v. *United States*, 355 U.S. 180 (1957); *One, Inc.* v. *Oleson*, 355 U.S. 371 (1957); *Sunshine Book Corp.* v. *Summerfield*, 355 U.S. 372 (1957). Both parties in the case at bar argue the question of obscenity on the assumption that this Court is competent to decide community standards. Petitioners' argument for a jury trial of right in obscenity cases is fundamentally inconsistent with the established principles of judicial review in such cases. While a judge is not necessarily superior to a jury in an obscenity case, the choice between them is one of policy, to be made by the state. The First Amendment cannot be said to render either one incompetent to decide the question. In this connection it should be pointed out that *Fay* v. *New York*, 332 U.S. 261, 288 (1947), and *Palko* v. *Connecticut*, 302 U.S. 319, 324 (1937), hold that the Sixth, Seventh and Fourteenth Amendments do not require the states to provide for trial by jury.

IV.

The Definition of Obscenity in the Kansas Statute Is Not Unconstitutionally Broad or Vague.

Petitioners complain that the definition of obscenity contained in K.S.A. 21-1102 is unconstitutionally vague. However, it is undeniable that the Supreme Court of Kansas, in applying this statute to the present booklets, considered itself controlled by all the proper constitutional standards. It is apparent from the court's opinion that it considered the statutory definition of obscenity to be synonymous with the standards announced by this Court for judging constitutionally suppressible obscenity. This may be seen from the Court's statement as follows:

> It can now be said that each of the following elements must independently be satisfied before a book can be held obscene: (1) the dominant theme of the material taken as a whole appeals to a prurient sexual interest of the average person; (2) the material is patently offensive because it affronts contemporary community standards relating to the description of sexual matters; and (3) the material is utterly without redeeming social value. (R. 53).

It should also be noted that the statutory language about which petitioners complain is found in subsection (a) of K.S.A. 21-1102. This language is limited by subsection (b) of that statute, which contains a codification of the *Roth* standard.

Both the language of the statute and the opinion of the court below restrict the definition of obscenity contained in K.S.A. 21-1102 to the standards previously announced by this Court. The *Roth* decision itself holds squarely against petitioners' claim that these standards do not provide reasonably ascertainable standards. *Cf. Mishkin* v. *New York*, 383 U.S. 502 (1966).

CONCLUSION

For the above reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Summary of State's Exhibits

Ex. A. "Sin Hooked," by William Kane (Leisure).

Happily married salesman discovers his former wife, assumed dead, to be very much alive. He doubles his pleasure by commuting from one wife to the other.

Intercourse—14-16, 98-100, 110-113, 163, 175-176.

Rear entry intercourse—36-37.

Fellatio—18, 163.

Sadism—51-53, 134-135.

Public display of sadism, transvestism, homosexuality, fellatio, sodomy—51-56.

Public display of adultery and homesexuality—171-178.

Ex. B. "Bayou Sinners," by J. X. Williams (Idle Hour).

Virile insurance investigator leaves local prostitute in search of rich policy holder, finds him in jungle orgy, rescues him and returns.

Nude prostitute—6, 9-10.

Intercourse with prostitute—11-14, 33-35.

Fellatio—59.

Mother has intercourse with drugged hero while her daughter observes—55-61.

Daughter changes place with mother—61-62.

Defloration—84-92.

Sadistic, interracial orgy with whipping, fellatio—118-144.

Lesbianism—159.

Intercourse between two men and one woman—167-170.

Ex. C. "Lust Hungry," by John Dexter (Leisure).

Accountant becomes involved with the boss's wife, who blackmails him with pictures of love scenes in order to retain his services.

Intercourse—5-10, 26-32, 51-53, 59-63, 136-142.

Three day orgy with one man and two women—74-81.

Lesbianism—76-78.

Sodomy per anus—88, 140.

Fellatio—156.

Ex. D. "Shame Shop," by Dean Hudson (Sundown).

Lusty sculptor introduces small midwestern college town to the earthier pleasures.

Intercourse and foreplay—31-33, 54-56, 78-84, 99-108, 127-130, 144-147, 178-180; two couples—40-47.

Strip Tease—65-70.

Fellatio and cunnilingus—105-106.

Ex. E. "Fleshpot," by Dean Hudson (Idle Hours).

Carhop sleeps her way to fame as a movie star, but learns to prefer women to men.

Intercourse—30-37, 81-86, 88, 97, 100-102, 117-118, 125-126, 129-130, 142, 146-153, 174-177.

Fellatio and cunnilingus—85.

Lesbianism—130-132, 189-190.

Ex. F. "Sinners Seance," by John Dexter

(Evening Reader).

Gloria Jean who is half of a fake mind-reading act, deserts her partner for a better lover and together they seek to swindle a young millionaire.

Intercourse and foreplay—31-36, 55-66, 72-74, 110-114, 141-144, 181-184.

Fellatio—63, 161-163.

Fellatio and cunnilingus—111-112.

Cunnilingus—165.

Ex. G. "Passion Priestess," by William Kane

(Evening Reader).

Writer searching for his mentor in the Caribbean finds instead a series of lusty women and a voodoo sex ritual.

Two lesbians have intercourse with a man—132.

Voodoo orgy—166-167, 172-180.

Lesbianism—130-131, 170.

Perversion inspired by aphrodisiac—104-105.

Ex. H. "Penthouse Pagans," by John Dexter

(Sundown Reader).

A private eye, searching for a runaway movie starlet, discovers willing women all along the way.

Fellatio and cunnilingus—42-3, 64-5.

Intercourse—40-44, 64-65, 67-68, 113-114.

Fellatio—67.